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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Order 95-11-5

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Issued by the Department of Transportation
on the 3rd day of November, 1995

Joint Application of

DELTA AIR LINES, INC.
SWISSAIR, SWISS AIR TRANSPORT
COMPANY, LTD.
SABENA S.A., SABENA BELGIAN WORLD
AIRLINES, and
AUSTRIAN AIRLINES, ÖSTERREICHISCHE
LUFTVERKEHRS AG

for approval of and Antitrust Immunity for
Alliance Agreements under 49 U.S.C. §§
41308 and 41309

Docket OST-95-618 - 31

ORDER

BACKGROUND

On September 8, 1995, Delta Air Lines, Inc. ("**Delta**"), Swissair, Swiss Air Transport Company, Ltd. ("**Swissair**"), Sabena S.A., Sabena Belgian World Airlines ("**Sabena**"), and Austrian Airlines, **Österreichische** Luftverkehrs AG ("**Austrian**") filed a joint application for approval of and antitrust immunity for three separate and parallel Commercial Cooperation and Marketing Agreements (the "**Cooperation** Agreements"), between Delta, on the one hand, and each of Austrian, Sabena and Swissair, on the other hand, and a Coordination Agreement among the four joint applicants covering the coordination of the three Cooperation Agreements (collectively referred to as the "Alliance Agreements"). The application was filed pursuant to 49 U.S.C. §§ 41308 and 41309.

According to the joint applicants, the objective of the Alliance Agreements is to establish legal frameworks that will allow the applicants to cooperate to the extent necessary to create a "**seamless** air transport system," while retaining their separate corporate and national identities. The applicants ask that we grant the requested approval and immunity for a five-year term,

consistent with the duration of approvals previously granted by the Department to Northwest Airlines, Inc. and KLM Royal Dutch Airlines. Orders 93-1-11 and 92-11-27.

Based on our initial review of the joint application, we determined that it lacked certain significant and relevant information needed by the Department to consider this matter fairly and expeditiously. Therefore, on September 25, 1995, we directed the joint applicants to submit additional information and evidence, as a supplement to their joint application; and deferred the **21-day** deadline for the filing of comments set forth in 14 C.F.R. Part 303 until further notice. Additionally, we stated that when we determined that the joint application was complete, we would establish a procedural schedule for comments and such other responsive pleadings as may be determined necessary to decide this matter. Order 95-9-27.

SUPPLEMENTAL FILING

On October 10, 1995, the joint applicants filed the supplemental information specified in Order 95-9-27. In conjunction with this submission, the applicants filed a joint motion under 14 C.F.R. 302.39 of our regulations requesting confidential treatment for certain documents and information.

First, regarding information items 1 and 2 (Order 95-9-27 at **2**), the applicants request that, besides confidential consideration, the Department restrict access to these documents and information to counsel and outside experts for interested parties in this case. The applicants state that such limited access is required due to the "highly competitively sensitive nature of the documents and information contained in these **responses**."

Second, regarding information item 7 (Order 95-9-27 at **3**), the applicants request **"routine"** Rule 39 confidential treatment.

Third, the applicants request that various Delta documents be withheld pending Departmental review on an *in camera* basis and a determination by the Department of both its confidentiality and its relevance to this proceeding.

INITIAL DETERMINATION

By notice dated October 13, 1995, we found that, based on the information supplied to the Department by the joint applicants in their supplemental filing, the record of this case was substantially complete, and we established procedural deadlines

(November 3, for the filing of comments; and November 13, for the filing of replies). However, we deferred action on the applicants' request for confidential and *in camera* treatment of certain information, pending review of any answers to the motion.

RESPONSIVE PLEADINGS

October 17, 1995, Trans World Airlines, Inc. ("**TWA**") filed an answer to the motion for confidentiality. While not objecting in principle that a carriers' confidential information should be protected under Rule 39, TWA does object to the applicants' proposal (1) to limit access to the information only to "**outside counsel and experts,**" and (2) to withhold entirely certain traffic, revenue, operating results and pricing from other interested parties. TWA states that it will be placed at a disadvantage if it is not permitted to avail itself of the expertise of its senior inside officials in developing its pleadings in this **matter.**¹ Also, the carrier states the information that the applicants want to exclude from the docket constitute key factual data that will form part of the basis for determining whether the proposed operations are anticompetitive.

On October 19, 1995, the Air Line Pilot Association ("**ALPA**") filed an answer opposing the applicants' motion for confidentiality. **ALPA** opposes the access limits imposed on its "**in-house**" experts. **ALPA** states that its "**in-house**" experts scrupulously honor the commitments made in Rule 39 confidentiality affidavits. Further, while **ALPA** recognizes the applicants' concerns regarding access of this information to its competitors, **ALPA** asserts that this concern is not justified in its case since **ALPA** is not a "**competitor**" of any of the joint applicants.²

On October 20, 1995, the joint applicants filed in reply. The applicants note that neither TWA nor **ALPA** objected in principle that their confidential information be protected under Rule 39, and **ALPA** did not object to its request for *in camera* treatment. The applicants state that TWA has "**misread**" the applicants' request for confidential treatment with respect to the scope of

¹ TWA states that "outside" counsel has to be able to discuss the evidence with the company's Senior Vice President & General Counsel to develop a policy position in the matter. For this reason, TWA states that it intended to show the documents only to its Vice President - Planning and Corporate Strategy, who has direct regulatory responsibility for the company, and to its Senior Vice President & General Counsel.

² **ALPA** did not address the applicants' request for *in camera* treatment.

the request for limited access and to the character of the documents that would be withheld by the applicants for *in camera* review.

The joint applicants note that they did not propose to exclude "**inside** counsel" from access to the documents, indeed, TWA would be able to use inside or outside counsel to develop its policy position in this proceeding; that TWA and **ALPA** do not deny that injury would occur to the joint applicants if the documents were released; and that the respondents have not shown any countervailing harm to their positions if the documents are accorded confidential treatment with access limited to counsel and outside experts.

The applicants view **TWA's** objection to the withholding by Delta of certain information pending *in camera* review by the Department to be without merit. The applicants state that this information does not relate to the proposed alliance or any of the proposed 'coordination activities, but rather to route-specific information about Delta's historic transatlantic services under the applicants limited code-share arrangements. The applicants assert that this data is more commercially sensitive than international passenger Origin and Destination data, that is routinely withheld from public disclosure, as it contains both carrier-specific and route-specific information. Finally, the applicants maintain that this information is not necessary for the Department to perform its analysis of the competitive and public interest issues in this case.

On October 20, 1995, TWA filed a petition for reconsideration requesting that the date for comments in this proceeding be postponed to November 16, 1995, or to two weeks after the Department's ruling on motions for confidentiality, whichever is later.

On October 23, 1995, the joint applicants filed an' answer opposing **TWA's** petition for reconsideration.

DECISION

We have decided to grant the joint applicants' request for confidential treatment for certain documents and information, limiting access to these data in certain respects. Upon an advisory review by the staff of certain **Delta** information, we will require that the joint applicants file specific data in the docket, as more fully described below. Finally, we grant **TWA's** request, in part, for an extension of the procedural schedule.

A. MOTIONS FOR CONFIDENTIAL TREATMENT AND ACCESS ISSUES

After careful review of this matter, we have decided to grant the joint applicants request for confidential treatment of material (1) relating to our Information Items 1 and 2 (Order 95-9-27 at **2**), restricting access to the materials to counsel and outside experts who represent the interested parties, and (2) relating to Information Item 7 (Order 95-9-27 at 3). We will require that all persons seeking access to these data submit properly executed affidavits as set forth in our October 13, 1995, Notice.

We note that the commenters do not object in principle to the protection of this information under Rule 39. Further, the parties objecting to the confidentiality motions have presented no arguments that confidentiality affidavit procedures are insufficient to allow meaningful comment on the issues raised or that the benefits of **full** public disclosure of the material would justify the risk of potential competitive harm to the joint applicants.

The objections filed with respect to the material submitted by the joint applicants center on access to the documents under confidentiality affidavit procedures.

We have decided to amend, in part, the access provisions of our October 13 **Notice**.³ We believe that interested parties to this proceeding can obtain adequate advice on the merits of the application through outside experts and persons authorized to review the various materials as set forth in our October 13 Notice.⁴ Balancing this factor against the competitive harm to the applicants that could result if access were expanded, we conclude that the undue competitive harm to the joint applicants outweighs the **commenters'** need for expanded access to this highly sensitive material. Order 93-12-32 at 5. Therefore, we will not expand the access as requested by TWA and **ALPA**, except as explained below.

³ Our October 13 Notice afforded limited access to counsel and outside experts of interested parties regarding Information Items 1, 2 and 7. We note our initial access limitation to be broader than that requested by the joint applicants. The joint applicants requested limited disclosure regarding only Information Items 1 and 2, and **"standard"** Rule 39 access for Information Item 7. We will now therefore harmonize our decision consistent with the joint applicants' request.

⁴ The joint applicants noted correctly that TWA **"misread"** the scope of the joint applicants' request for limited access regarding counsel.

B. REQUEST FOR *IN CAMERA* REVIEW TO DETERMINE RELEVANCE

As an initial matter, in our scheduling notice dated October 13, 1995, we concluded that:

"[u]pon expiration of the regulatory comment period, we will determine whether confidential treatment of certain information and informal review of Delta's material is appropriate. Regarding the applicants' request for *in camera* review, if we determine that review of the material is appropriate, and we find that the information is relevant to our determination in this matter, we will require that the information be filed in the record. Conversely, if we initially determine that the reviewed materials are not relevant to our determination, we will not require that the materials be filed in the docket, while reserving our right subsequently to determine, at anytime, that the previously reviewed information is significant and relevant, and therefore must be placed in the docket. Of course, the applicants could then seek confidential treatment of this material under Rule 39."

The joint applicants have withheld from their responses to our Informational Items 1 and 2 data that they have characterized as **"extremely sensitive commercial information."** The joint applicants have requested that we undertake a review of these data to determine its relevance to this case. The joint applicants represent to the Department that this information and data deals with "(a) the number of code-share seats purchased, (b) the price paid by Delta for code-share seats, (c) traffic, revenue, operating and financial results of code-share routes and (d) frequent flyer **fees.**" Joint Applicants Motion for Confidential Treatment at 8, filed October 10, 1995.

The Department's interest and authority in this matter relates to the impact on competition in any relevant market from the grant of antitrust immunity. Based on the joint applicants' characterization of this material, we have determined that the information and data included in items (a), (b), and (d) are not relevant to specific issues currently determined to be central to our evaluation. As previously stated, if in the course of our analysis we determine that this information is central to our evaluation, we reserve the right to require that the information be filed in the docket. In addition, these data (specifically, the number of block-space, code-share seats purchased; the price paid by Delta for these seats; and frequent flyer fees) are represented to be highly sensitive business information involving the joint applicants' current block-space arrangements. However, the general descriptor for item (c) "traffic, revenue, operating and financial results of code-share routes," was not sufficiently

detailed to allow us to determine its **relevance**,⁵ and accordingly we reviewed this information on October 31. Based on that review, we have determined that this information is relevant to our public interest assessment of the merits of this **application**.⁶ Although the reviewed material may contain certain information considered sensitive by the joint applicants, we believe that the Department's statutory responsibility to evaluate the competitive aspects of this case outweigh any real or perceived harm that disclosure of this information may have regarding Delta. Further, to provide for appropriate insulation of this material, we have decided, *sua sponte*, to provide for limited access to this material. Therefore, counsel and outside experts, for the interested parties only, may review these documents, consistent with our confidential affidavit procedures.

C. EXTENSION OF TIME TO FILE COMMENTS AND REPLIES

Since we are now requiring the joint applicants to submit additional documents and information into the docket, by November 6, 1995, we find it appropriate to extend our procedural schedule for filing comments and **replies** in this matter to November 13 and 20, **1995, respectively**.⁷ We find that this extension of time will provide all interested parties sufficient time to analyze adequately and comment fully on all material in the public and non-public record.

ACCORDINGLY:

1. We grant the Joint Applicants' October 10, 1995, motion for confidential treatment of Information Items 1 and 2 (Order 95-9-27 at **2**), limiting access to each of these informational items to counsel and outside experts, and require that persons seeking to review these documents file appropriate affidavits;

⁵ In the future, we expect applicants requesting advisory review by the Department to exercise greater precision in describing their material.

⁶ Further, we directed the joint applicants, in order to facilitate analysis by the Department and interested parties of this material, to clarify various exhibits in certain respects. Specifically, the **"PNR"** abbreviation used on exhibit pages **DL-DOT-197** and **198**; and the **"x"**, **"1"**, **"2"** and **"3"** character designations used in exhibit pages **DL-DOT-199** through **280**. We also directed the joint applicants to characterize more **precisely** and clearly the data reflected in exhibit pages **DL-DOT-197** through **287**.

⁷ Further, we direct that any comments be delivered to counsel for the joint applicants no later than **5pm**, November 13, 1995; and that any replies be delivered to counsel for the commenters no later than **5pm**, November 20, 1995.

2. We grant the Joint Applicants' October 10, 1995, motion for confidential treatment of Information Item 7 (Order 95-9-27 at **3**), subject to the filing of appropriate affidavits by persons seeking review of these documents;

3. We grant the Joint Applicants' October 10, 1995, motion for review by the Department of certain Delta Air Lines, Inc. documents;

4. Based on our review of the data supplied to the Department by the Joint Applicants in ordering paragraph 3 above, we direct the Joint Applicants to file on or before November 6, 1995, in this docket all Delta Air Lines, Inc. materials considered by Department staff on October 31, 1995, consistent with n.6 of this order. Specifically, the data and information described in item **"(c) traffic, revenue, operating and financial results of code-share routes"** (see Joint Applicants Motion for Confidential Treatment at 8, filed October 10, 1995);

5. We determine it appropriate, *sua sponte*, to provide the information described in ordering paragraph 4 confidential treatment, limiting access to this material to counsel and outside experts;

6. With respect to Delta Air Lines, Inc. materials (a), (b) and (d) (see Joint Applicants Motion for Confidential Treatment at 8, filed October 10, **1995**), these materials need not be submitted at this time;

7. Interested parties may review the confidential material (specifically, Information Items 1, 2, and 7, and the material described in ordering paragraph 4) in the Docket Section at the U.S. Department of Transportation, Room PL 401, 400 Seventh Street, SW, Washington, D.C., provided that such parties submit in advance an affidavit stating that he or she will preserve the confidentiality of the information and will only use it to participate in this proceeding. Further, regarding information afforded limited access by the Department, each affidavit must specifically indicate that the person(s) are counsel or outside expert(s) for the interested parties in this case;*

8. We grant, in part, Trans World Airlines, **Inc.'s** petition for an extension of the period for filing comments, establishing the procedural schedule of November 13, 1995, for the filing of comments to the application (comments will be delivered to counsel for the joint applicants no later than **5pm**, on November 13, 1995); and November 20, 1995, for the filing of

8 Any pleading or other filing that includes or discusses information contained in the confidential documents must be accompanied by a Rule 39 motion requesting confidential treatment.

replies (replies will be delivered to counsel for the commenters no later than **5pm**, on November 20, 1995);

9. We grant all motions for leave to file otherwise unauthorized documents; and

10. We will serve this order on all interested parties.

By:

MARK L. GERCHICK

Acting Assistant Secretary for Aviation
and International Affairs

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